

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SUSAN ALBISTON, et al.,)	
)	
Plaintiffs)	
)	
v.)	
)	Civil No. 90-262-P-C
COMMISSIONER, MAINE)	
DEPARTMENT OF HUMAN SERVICES,)	
et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR JUDGMENT
ON A STIPULATED RECORD**

This class action raises the question whether ' 1983¹ remedies are available to enforce provisions of Title IV-D of the Social Security Act, 42 U.S.C. ' 651 *et seq.*² It must also be determined whether notice currently being provided to AFDC recipients regarding support payments meets the requirements of due process. The parties have submitted the case for judgment on a stipulated record. Any factual disputes may therefore be resolved by the court. *See Boston Five Cents*

¹ 42 U.S.C. ' 1983.

² The state of Maine participates in the Aid to Families with Dependent Children ("AFDC") program, a cooperative federal-state financial assistance program providing cash assistance to needy families with dependent children. *See generally* 42 U.S.C. ' 601 *et seq.* Under the AFDC program states must adopt a child-support enforcement program that complies with the requirements of Title IV-D, 42 U.S.C. ' 651 *et seq.* 42 U.S.C. ' 602(a)(27). The Secretary of Health and Human Services ("HHS") approves a state's support program and oversees its implementation to ensure that the state has substantially complied with the plan and Title IV-D. *See* 42 U.S.C. ' 652. The child-support program is administered in Maine by the Department of Human Services ("DHS") and the Maine Department of Finance. 5 M.R.S.A. ' ' 282-83 and 5 M.R.S.A. ' 1541.

Sav. Bank v. Secretary of the Dep't of Hous. & Urban Dev., 768 F.2d 5, 11-12 (1st Cir. 1985).

I. BACKGROUND

This action was brought by families currently receiving AFDC and child-support assistance. As a condition of receiving the assistance, these families have assigned their child-support rights to DHS. *See* 42 U.S.C. ' 602(a)(26)(A).³ When DHS collects a monthly support payment in the month the payment is due, it must "pass-through" the first \$50 of that payment to the AFDC family. 42 U.S.C. ' 602(a)(27) and 657(b)(1).⁴ DHS must make that payment within fifteen days of its receipt. *See* 42 U.S.C. ' 652(i); 45 C.F.R. ' 302.32(f)(2)(ii). Some members of the plaintiff class also receive a so-called "gap payment." This additional amount is paid to help "reduce the gap between the funds available to a[n AFDC] family and the [state's established] standard of need." *Doucette v. Ives*, 744 F. Supp. 23, 24 (D. Me. 1990) *rev'd on other grounds*, 947 F.2d 21 (1st Cir. 1991); Stipulations of Fact & 1. The gap payment is "added to the amount of [AFDC] aid otherwise payable to [the] family," 42 U.S.C. ' 602(a)(28); *Doucette v. Ives*, 744 F. Supp. at 25, and must be paid "promptly" without any "delay attributable to the agency's administrative process." 42 U.S.C. ' 602 (a)(10)(A); 45 C.F.R.

³ The statute provides in relevant part: "[A]s a condition of eligibility for [AFDC assistance], each applicant or recipient [is] . . . required . . . to assign the State any rights to support from any other person such applicant may have" 42 U.S.C. ' 602(a)(26)(A).

⁴ The pertinent provision reads:

[T]he first \$50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month

42 U.S.C. ' 657(b)(1).

' 206.10(a)(5)(i).⁵

DHS has failed to meet the time requirements for sending out pass-through and gap payments.⁶ Class plaintiffs have brought this action seeking a declaration that DHS has violated the time requirements and an order permanently enjoining DHS from delaying gap and pass-through payments in the future. Class plaintiffs also seek certain notice and other relief. For its part, DHS maintains that its shortcomings must be corrected under Title IV-D's administrative remedies and not by way of a private action under ' 1983. It insists that Congress has foreclosed all such actions by enacting a comprehensive enforcement scheme under Title IV-D.⁷

⁵ There is no dispute that the class members are entitled to receive gap and pass-through payments. The parties also agree that DHS is obligated under Title IV-D to make these payments within the noted time frames.

⁶ *See, e.g.*, Stipulations of Fact & 42. DHS estimates that it currently fails to meet the 15-day deadline for distributing support `` in approximately 66% of its AFDC cases." *Id.* DHS attributes the delays to a variety of administrative problems, including inadequate staffing, computer programming errors, clerical mistakes (*e.g.*, the failure to match up the support payment received with the appropriate AFDC family) and errors caused by other collection agencies or states. *See* Stipulations of Fact && 47-56.

⁷ DHS has previously been before this court for its failure to comply with the child-support provisions. In *Wilcox v. Ives*, 676 F.Supp. 355 (D.Me. 1987), various AFDC recipients brought suit

against the agency charging that it violated Title IV-D by ``failing to take adequate and necessary measures to insure timely payment of child support by absent parents" *Id.* at 357. The parties agreed to dismiss that charge after DHS ``undertook several steps to remedy [the] problems." *Id.*

II. AVAILABILITY OF ' 1983 REMEDIES

It is well-established that ' 1983 provides a private cause of action for violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The United States Supreme Court has recognized only two exceptions to this rule. No cause of action will lie where (1) ``the statute [does] not create enforceable rights . . . within the meaning of ' 1983," or (2) ``Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987). I conclude that neither exception applies here.

In deciding whether Title IV-D creates an ``enforceable right" I am to apply a three-part test. I must first consider whether the promptness requirements were ``intend[ed] to benefit" the class plaintiffs. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (citation and internal quotation marks omitted); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990). If so, then I must find that a right enforceable under ' 1983 exists unless the time restrictions ``reflect[] merely a `congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," *id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)), or unless the time restrictions are ``too vague and amorphous' such that [they are] `beyond the competence of the judiciary to enforce,'" *id.* (quoting *Golden State*, 493 U.S. at 106.).⁸ Applying this analysis, I am persuaded that Title IV-D's time restrictions create enforceable rights

⁸ Two circuit courts have addressed this question in the context of Title IV-D and have reached opposite results. In *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), the Eleventh Circuit concluded that a state's failure to collect support payments pursuant to Title IV-D was not actionable under ' 1983, finding that Title IV-D's collection requirements were intended to benefit only the public fisc and not AFDC recipients. *Id.* at 1563-66. Faced with a similar question, the Six Circuit held: ``We see no reason to conclude that the statute must be read to protect needy families with children to the exclusion of protecting the public fisc or vice versa. It seems eminently reasonable that Congress intended both purposes to be served." *Carelli v. Howser*, 923 F.2d

within the meaning of ' 1983.

1208, 1211 (6th Cir. 1991).

The time constraints involved here were clearly intended to benefit the AFDC recipients. While it may be true that requiring states to promptly disburse funds increases program efficiency and therefore benefits the state, this does not take away from the obvious conclusion that needy recipients receive substantial benefit from a timely payment. *See Carelli v. Howser*, 923 F.2d 1208, 1211 (6th Cir. 1991).⁹ Indeed, DHS offers no argument to refute this conclusion.¹⁰ Moreover, the obligations imposed on the states are unambiguous. Section 652(i) says that "a State *must* distribute" the pass-through payments in the time established by the HHS regulations. (Emphasis added.) Those regulations state unequivocally that the pass-through payments "must be sent to the family *within 15 calendar days* of the date of [their] initial receipt." 45 C.F.R. ' 302.32(f)(2) (emphasis added). Nothing in the legislative history suggests otherwise. The time frame for forwarding gap payments is equally clear. Gap payments must be paid with "reasonable promptness," *see* 42 U.S.C. ' 602(a)(10)(A), and

⁹ Indeed, the legislative debate over 42 U.S.C. ' 652(i) confirms that Congress was concerned with the AFDC recipients in imposing the time constraints. In arguing that the provision was necessary, Senator Bradley remarked:

Since there is no pressure on States to distribute [the pass-through] money as quickly as possible, many States consider distribution a low priority, which leads to long delays. These delays in distributing child support collections result in serious harm to families that depend on child support as a regular source of income.

Senate, Cong. Rec. S7993 (June 16, 1988).

¹⁰ DHS in fact barely addresses the question whether Title IV-D creates enforceable rights. It argues for the first time in its Supplemental Memorandum that the comprehensiveness of Title IV-D's enforcement scheme suggests that DHS is accountable only to HHS and, thus, that DHS could not expect "that private litigants would have the ability to enforce one hundred percent compliance in [sic] every audit requirement of the IV-D program." *See* Defendant's Supplemental Memorandum at 3. This argument is misplaced. The time frames here are not merely audit criteria but are statutorily prescribed conditions. DHS' expectations regarding how these obligations are enforced is irrelevant to deciding in the first instance whether an enforceable right exists. Finally, as discussed more fully below, there is nothing in the Title IV-D enforcement scheme that would warrant the conclusion reached by DHS concerning the right of private litigants to enforce compliance.

“without any delay attributable to the agency's administrative process,” 45 C.F.R. § 206.10 (a)(5)(i).
See Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981).¹¹

Having found that the time requirements under Title IV-D do create enforceable rights, the inquiry is narrowed to determining whether in enacting Title IV-D Congress expressed a desire to preclude § 1983 actions. Here, the burden rests on DHS to “show by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.”

Wilder v. Virginia Hosp. Ass'n, 496 U.S. at 520-21 (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. at 423). DHS acknowledges that the statute lacks any express provision precluding § 1983 enforcement. DHS therefore must prove that “the statute itself creates a remedial scheme that is ‘sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.’” *Id.* at 521 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)). In this connection, DHS argues that the audit and oversight authority given to HHS under Title IV-D is “sufficiently comprehensive” to demonstrate Congress' desire to preclude § 1983 actions. I disagree.

¹¹ This conclusion is consistent with *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). The *Suter* Court held only that a state is bound by conditions attached to the disbursement of federal money only if the conditions are unambiguous, such that the state knows what is expected of it. There is no question here that DHS fully understood its obligation to meet the time frames for forwarding the gap and pass-through payments. It argues only that it could not expect that these conditions would be enforced under § 1983.

The United States Supreme Court has been reluctant to find ' 1983 enforcement foreclosure, saying over and over again: ``We do not lightly conclude that Congress intended to preclude reliance on ' 1983 as a remedy for deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24 (citation and internal quotation marks omitted); *see also Wilder*, 496 U.S. at 520. Indeed, the Court has found a remedial scheme sufficient to displace ' 1983 actions in only two instances. *See Sea Clammers*, 453 U.S. 1; *Smith v. Robinson*, 468 U.S. 992 (1984). In both, the statute in question contained elaborate and carefully tailored administrative and *judicial* enforcement schemes.¹² Title IV-D has no ``*comparable* provision for private judicial or administrative enforcement." *Wilder*, 496 U.S. at 521 (emphasis added).

¹² The *Sea Clammers* case involved the Federal Water Pollution Control Act, 33 U.S.C. ' 1251 *et seq.*, which gave the Environmental Protection Agency ``considerable enforcement power through the use of noncompliance orders, civil suits, and criminal penalties", and expressly provided for citizen suits. *Wilder*, 496 U.S. at 521. *Smith v. Robinson* involved the enforcement scheme under the Education of the Handicapped Act which provided for local administrative review and a right to judicial review. *See* 20 U.S.C. ' ' 1412(4), 1414(a)(5), 1415.

The enforcement scheme here merely gives HHS audit and oversight responsibilities to ensure state compliance with the Title IV-D provisions.¹³ *See* 42 U.S.C. ' 652. Following an audit in which a state has failed to comply ``substantially" with the requirements of Title IV-D, HHS may also withhold federal funding.¹⁴ *See* 42 U.S.C. ' 603(h)(1). This enforcement scheme is seriously deficient in its ability to address the plaintiffs' concerns. The statute provides no avenue for private relief, such as citizen suits or judicial review of agency actions. Although HHS may withhold funds, this is done only after having performed an audit. No audit has been performed here. Moreover, since HHS' audit criteria do not require complete compliance there is no assurance that *each* member of the class will receive payment on time.

HHS' authority to audit and withhold funds alone simply does not demonstrate a congressional desire to preclude ' 1983 actions. This much is made clear in *Wright*, 479 U.S. at 428 (reliance on the ``authority to audit, enforce annual contributions contracts, and cut off federal funds . . . [are] generalized powers [which] are insufficient to indicate a congressional intention to foreclose ' 1983 remedies"). *See also Wilder*, 498 U.S. at 521-22; *Rosado v. Wyman*, 397 U.S. 397, 420-22 (1970); *Lynch v. Dukakis*, 719 F.2d 504, 511 (1st Cir. 1983). I therefore conclude that the enforcement scheme under Title IV-D is insufficiently comprehensive to demonstrate a congressional intent to

¹³ A separate Office of Child Support Enforcement (``OCSE") has been created to carry out these tasks. *See* 42 U.S.C. ' 652(a); 45 C.F.R. pt. 300.

¹⁴ A state has substantially complied if it has followed the requirements of Title IV-D ``in 75 percent of the cases reviewed" by HHS. 45 C.F.R. ' 305.20.

foreclose ' 1983 remedies.¹⁵

III. DUE PROCESS CONCERNS

The plaintiffs assert also that DHS has violated their due process rights under the Fourteenth Amendment by failing to provide adequate notice of any delay in payments or an opportunity to be heard concerning late payments. Due process requires that any notice provided be ``` reasonably calculated, under all the circumstances, to apprise [AFDC recipients] of the [DHS] action and afford them an opportunity to present their objections.'" *Coughlin v. Regan*, 584 F. Supp. 697, 708 (D. Me. 1984) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). I conclude that the notice currently being provided by DHS satisfies that standard.

DHS now informs support recipients about the status of their pass-through and gap payments in two ways. First, AFDC families receive a monthly AFDC check stub indicating what form of assistance -- gap or pass-through -- is being paid. *See* Stipulated Record Exh. O. The stub also tells the recipient that the payment relates to support collected by DHS and reveals the particular month in which the support was collected. *Id.* Finally, the check stub informs the recipient of her right to a hearing should the amount be considered incorrect. *Id.* Second, AFDC families receive an annual notice showing the amount of support collected by DHS during the year, as well as the amount paid out in gap or pass-through payments during that same period. *See* Stipulated Record Exh. N. I find that these statements together adequately apprise recipients of the status of their gap and pass-through payments. Any action DHS has failed to take or has taken in error should be detected within a

¹⁵ The legislative history of Title IV-D itself provides no indication that Congress intended to displace ' 1983 remedies by enacting the enforcement scheme.

reasonable amount of time by a review of these notices. Although the information may not be as exact or as complete as it could be, due process ``does not require the best conceivable notice" *Coughlin v. Regan*, 584 F. Supp. at 708. The notices here convey enough information for recipients to discover errors and omissions by DHS, including its failure to forward amounts due when a collection has occurred.

IV. CONCLUSION

For the foregoing reasons, I conclude that DHS has satisfied the requirements of due process but that it has violated the time provisions under Title IV-D by failing to forward pass-through and gap payments in a timely manner. I further conclude that the plaintiffs may avail themselves of the relief afforded under ' 1983 to remedy these violations.

Accordingly, I recommend that a declaratory judgment be entered in favor of the class plaintiffs on the claims stated in the first, second, third and fifth causes of action of their complaint and in favor of the defendants on the fourth cause of action, and that the class plaintiffs be directed to prepare and file a proposed form of judgment, including appropriate injunctive relief, by a date certain.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 28th day of July, 1992.

David M. Cohen
United States Magistrate Judge